

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR PETITIONERS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 11,977

FILED NOV 9 1953

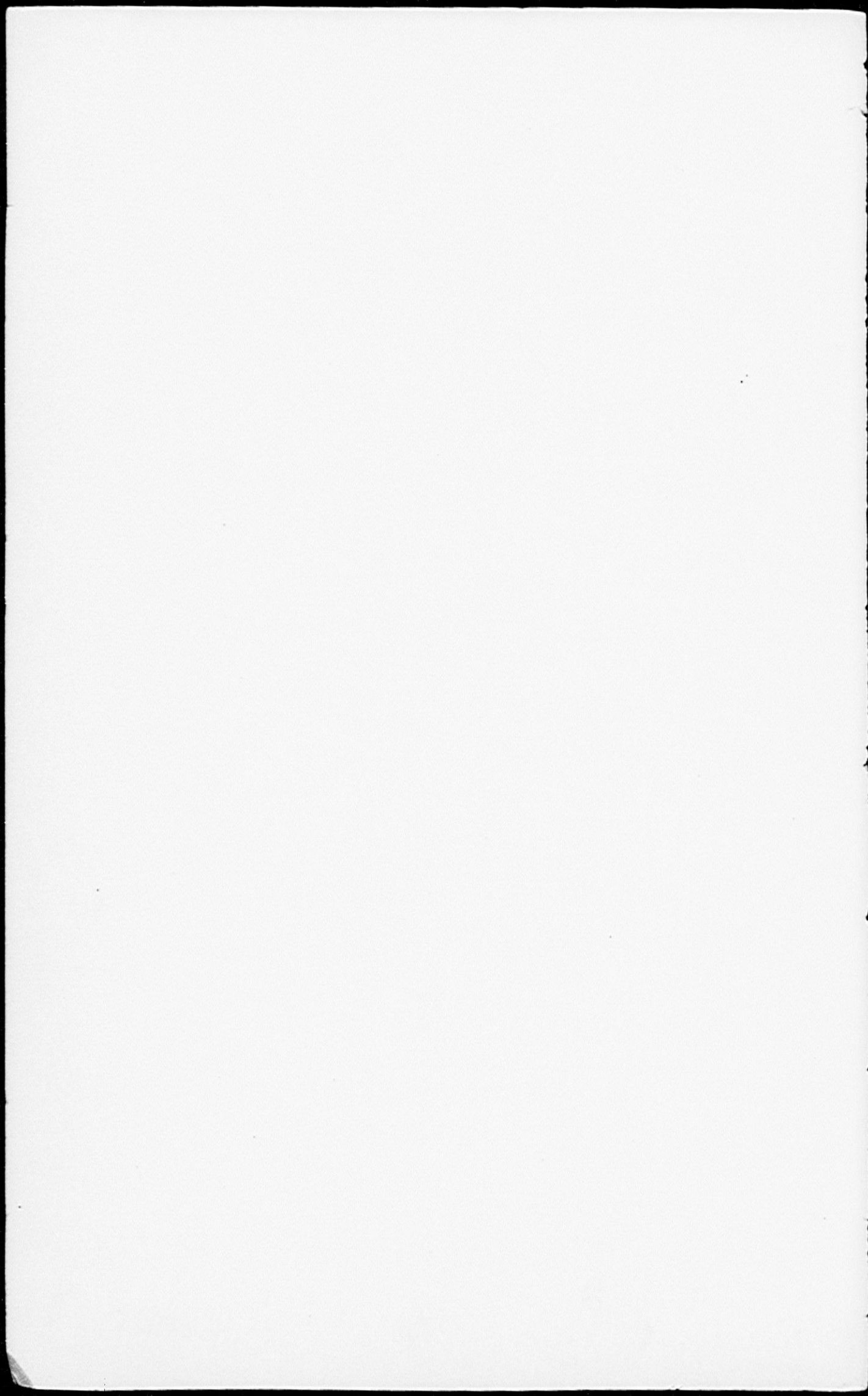
WILLIAM S. ABERNETHY AND
JANE R. ABERNETHY *Petitioners*

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of the Tax Court of the
United States

J. BARRETT CARTER,
Denrike Building,
Washington 5, D. C.,
Attorney for Petitioners.



STATEMENT OF QUESTIONS PRESENTED

The question is whether voluntary payments made by a church to its former pastor, who had resigned long before and had no longer any official connection with the church, are taxable as ordinary income.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,977

WILLIAM S. ABERNETHY AND
JANE R. ABERNETHY, *Petitioners*

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COMMISSIONER OF INTERNAL REVENUE,
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On Petition for Review of the Decision of the Tax Court of the
United States

BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

This case originated in the Tax Court of the United States. The Commissioner mailed the taxpayers a ninety-day letter and taxpayers appealed to the Tax Court in due time. The facts giving the Tax Court jurisdiction are stated in the petition filed in that Court (App. 2). The decision of the Tax Court was rendered June 11, 1953.

Petition for review by this Court was timely filed September 2, 1953.

This Court has jurisdiction pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code (26 USCA 1141 and 1142). The petitioners are citizens of the United States and residents of Montgomery County, Maryland. Pursuant to the provisions of Section 1141 (b) (2) of the Internal Revenue Code (26 USCA 1141 (b) (2)), it has been stipulated in writing that the decision of the Tax Court may be reviewed by the United States Court of Appeals for the District of Columbia Circuit (App. 24).

STATEMENT OF THE CASE

The facts are stipulated (App. 14) and may be summarized as follows:

On May 4, 1941, William S. Abernethy, one of the petitioners herein, resigned as pastor of Calvary Baptist Church and Congregation, of Washington, D. C., effective December 31, 1941. He was then sixty-nine years of age, had served as pastor of said Church for twenty years, and felt that he was no longer physically able to perform the arduous duties of a pastor for so large a congregation, said Church at that time having a membership of over three thousand members. Since his retirement he has performed no official duties for said Church and was not expected to do so.

When he retired, the trustees of the Church recommended to the membership of the Church that the "church give Dr. and Mrs. Abernethy, as a token of its gratitude and appreciation, one-half year's salary (\$3650), payable in instalments of \$100 per month, beginning on January 1, 1942." (App. 15.) The Church unanimously approved the recommendation of the trustees and voted to pay Dr. and Mrs. Abernethy \$3650.00, payable in instalments of \$100.00 a month, beginning January 1, 1942. (App. 16.)

Since the payments were for a limited period, the trustees of the Church recommended that the Church continue to pay the sum of \$100.00 a month to Dr. William S. Abernethy. In accordance with this recommendation, the members of the Church and Congregation, at a meeting held March 1, 1944, adopted the following resolution:

“Resolved, That, in accordance with the recommendation of the Board of Trustees of this Organization, the treasurer of this Organization be, and hereby is, authorized and directed to pay to Reverend W. S. Abernethy, D. D., Pastor Emeritus of this Church, for and during his lifetime, the sum of one hundred dollars (\$100.00) a month, in appreciation of his long and faithful services to Calvary Baptist Church.”
(App. 16.)

The Church continued to pay Dr. Abernethy \$100.00 a month until the month of May, 1947, at which time the payments were increased to \$200.00 a month by action taken at a meeting of the members of Calvary Baptist Church and Congregation held March 12, 1947. (App. 17.)

The Deputy Commissioner of Internal Revenue, upon application to the Commissioner for a ruling, held that the payments made by the Church to petitioners in 1942 were taxable (App. 23), and relying on this ruling the petitioners paid the tax on payments received from the Church until the year 1949. During the year 1949 the United States Circuit Court of Appeals, Fifth Circuit, decided in a case in which the facts are substantially identical with the instant case (*Schall v. Commissioner*, 174 F. 2d 893), that the Commissioner was in error. In their return for 1949 the petitioners disclosed the payments but they were not included as part of their taxable income. The Commissioner refused to follow the *Schall* case and made a deficiency assessment against petitioners of \$202.14, and his action was sustained by the Tax Court.

STATEMENT OF POINTS

The Tax Court erred in holding that voluntary and gratuitous payments made in 1949 by Calvary Baptist Church and Congregation to petitioner, William S. Abernethy, a former pastor of the Church, were taxable income to the petitioners.

SUMMARY OF ARGUMENT

The sole issue in this case is whether payment of \$2,400.00 made to the petitioner, William S. Abernethy, in 1949 by Calvary Baptist Church and Congregation was a gift or taxable income.

(a) Upon the resignation of Dr. Abernethy as pastor of Calvary Baptist Church on December 31, 1941, after having served as pastor of the Church for twenty years, the Church voted Dr. and Mrs. Abernethy a gift of \$3,600.00 payable in monthly installments of \$100.00 each. This was the beginning of the payments now in question. The original payments were designated by the trustees of the Church as a "gift to Dr. and Mrs. Abernethy as a * * * token of gratitude and appreciation." Mrs. Abernethy had never been an employee of the Church.

(b) The Church, on March 1, 1944, voted to continue the payments during the life of Dr. Abernethy, and on March 12, 1947, increased the payments to \$200.00 a month "until further action * * * of the Church."

(c) The Deputy Commissioner of Internal Revenue, upon application to the Commissioner for a ruling, held that the payments made to petitioners in 1942 were taxable as income. Pursuant to this ruling, the petitioners paid the tax on the payments received from the Church until the year 1949. On June 3, 1949, the United States Circuit Court of Appeals, Fifth Circuit, decided in a case in which the facts are substantially identical with the instant case (*Schall et al. v. Commissioner*, 174 F. 2d 893) that the

Commissioner was in error. Relying on this decision, the petitioners, in their return for 1949, disclosed the payments received in that year, but did not include them in their taxable income.

(d) All of the before mentioned payments, including the payments made in 1949, were without consideration and were voluntary gifts on the part of the Church and for which no services were performed or intended to be performed, and payments are subject to termination at any time by the Church. In other words, Dr. Abernethy has no vested right in the continuation of the payments and no legal right to demand payment. He had long since been paid in full for services rendered, hence the payments received in 1949 constituted a gift and are not taxable as income.

ARGUMENT

The facts in this case are almost identical with the facts in the case of *Schall et al. v. Commissioner of Internal Revenue*, 174 F. 2d 893. It appears in that case that Dr. Charles Schall resigned as pastor of Wayne Presbyterian Church on account of ill health, after having served in that capacity for eighteen years. At a meeting of the congregation of the Church the following resolution was adopted:

“Whereas the pastor of this Church, Rev. Dr. Charles Schall, has become incapacitated for the further service as pastor and has requested the Congregation to join in a petition to Chester Presbytery to dissolve the pastoral relation; and

“Whereas the Congregation *moved by affectionate regard for him and gratitude* for his long and valued ministry among them, desire that he should continue to be associated with them in an honorary relation;

“Now, Therefore, Be It Resolved that, effective upon formal dissolution by Presbytery, Rev. Charles Schall be constituted Pastor Emeritus of this church with salary or honorarium amounting to Two Thousand Dollars (\$2000.) annually, payable in monthly install-

ments, with no pastoral authority or duty, and that the Session of this Church be requested to report this action to Presbytery."

The Court held unanimously that the payments to Dr. Schall were gifts and were not taxable income. Referring to the case of *Bogardus v. Commissioner*, 302 U. S. 34, 58 S. Ct. 61, the Court said:

"Where, as here, all the facts and circumstances surrounding the adoption of the resolution clearly prove an intent to make a gift, the mere use of the terms 'salary' and 'honorarium' do not convert the gift into a payment for services."

The *Bogardus* case *supra* involved the question as to whether payment of \$10,000.00 to the taxpayer was a gift. The payment was part of a distribution, aggregating over \$600,000.00, made by the Unopco Corporation at the instance of its stockholders to petitioner and others who had theretofore rendered service as employees or in some other capacity to the Universal Oil Products Company. The contention of the Commissioner was that the Unopco stockholders had benefited by the former services of the recipient. The Court said:

"Because the Unopco stockholders had benefited by the past services of the recipients, it by no means follows that the distribution in question was not a gratuity.

* * * * *

"The resolutions, which employ the word 'bonus,' were adopted to carry into effect the will of the stockholders expressed at their meeting. What occurred at that meeting, as we have already said, indicated their clear intention to make gifts. And since intention must govern, we must consider the word used in the light of the intention.

* * * * *

"Some stress is laid on the recital to the effect that the bounty is bestowed in recognition of past loyal

services. But this recital amounts to nothing more than the acknowledgment of an historic fact as a reason for making the gifts. A gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient."

In the case of *Robertson v. United States*, 343 U. S. 711 (72 S. Ct. 994), while the Supreme Court held that the payment of a prize to the winner of a symphony music contest was a discharge of a contractual obligation and not a gift, the Court used this significant language:

"The case would be different if an award were made in recognition of past achievements or present abilities, or if payment was given not for services, see *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 730, 49 S. Ct. 499, 504, 73 L. Ed. 918, but out of affection, respect, admiration, charity or like impulses."

In *Cunningham v. Commissioner*, 3 Cir. 67 F. 2d 205, it appears that the taxpayer had served as president of a Canadian corporation at a salary of \$15,000.00 a year. The stock of the company was purchased by Canadian interests and a new set of directors elected by the new owners. Thereupon, the president resigned. After his resignation the board passed the following resolution:

"Resolved that in appreciation of Mr. Cunningham's excellent guidance of this corporation through times of difficulty and depression a sum of \$15,000 be, and is hereby, awarded to Mr. Cunningham as an honorarium, said sum to be payable forthwith."

The Court said, in holding the payment was a gift:

"It is clear to us that the money was a gift, a voluntary honorarium, and was freely given without any legal liability existing to necessitate such payment."

In *Blair, Commissioner, v. Rosseter*, 9 Cir. 33 F. 2d 286, the Court held that a payment of \$50,000 to the president

of a corporation "in recognition of his able and successful direction of the affairs of the company during the past ten years" was a gift.

The Court of Claims in *Andrew W. Dewling v. The United States*, 121 C. Cls. 635, held that annuities given by Act of Congress to certain employees of the Isthmian Canal Commission or the Panama Railroad Company on the Isthmus of Panama, based on salary previously paid, were not taxable. The Court said:

"Both Acts were passed not to fulfill a legal obligation, but as a token of gratitude for services faithfully rendered in an insect-infested, fever-ridden, tropical land. Legally, the Government owed them nothing. What it appropriated for them was a token of 'the thanks of Congress' for the services rendered."

CONCLUSION

The cases cited in this brief show that three different Circuit Courts of Appeal, the Supreme Court of the United States and the Court of Claims sustain the position of petitioners. The Tax Court, without the citation of any authority, except a brief reference to the case of *Bogardus v. Commissioner*, 302 U. S. 34, decided otherwise, stating in so many words that it would not follow the decision in the *Schall* case because, to quote from the opinion, "we are not convinced that our holding in the *Schall* case was wrong notwithstanding the reversal thereof by the Circuit Court."

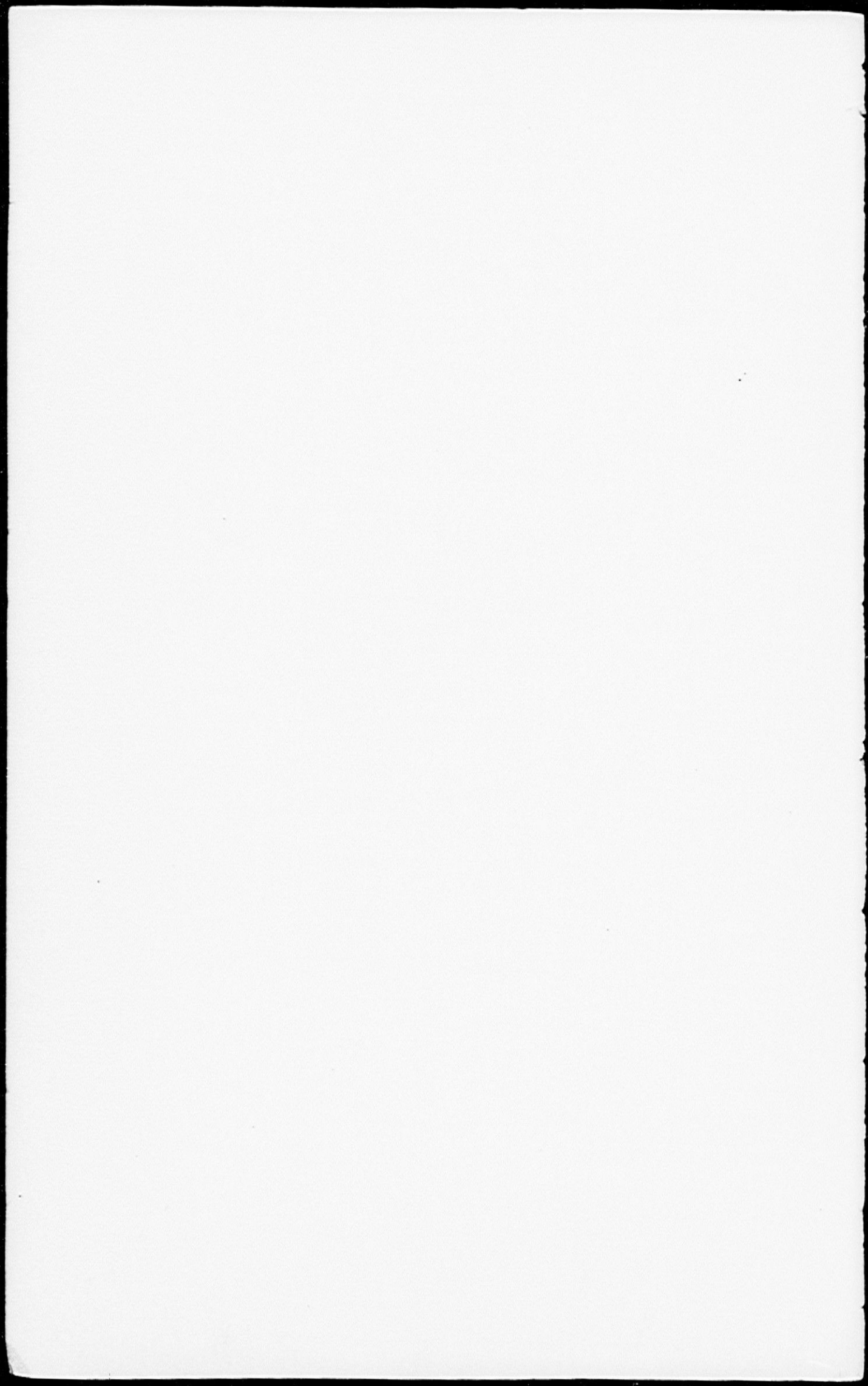
As was said in the *Bogardus* case, *supra*, "The statutory provisions involved are very plain and direct. Section 22 (a) of the applicable revenue Act (45 Stat. 791) provides that 'gross income,' among other things, includes 'compensation for personal service, of whatever kind and in whatever form paid.' Subdivision (b) (3), immediately following, provides that 'the value of property acquired by gift, bequest, devise or inheritance' shall not be included in gross income and shall be exempt from taxation under the income-tax title."

It is beyond dispute, as shown by the stipulation of facts, that the payments to Dr. Abernethy were without consideration other than love and affection, and were not compensation for "personal service" and therefore were not taxable, and the decision of the Tax Court should be reversed.

Respectfully submitted,

J. BARRETT CARTER,
Denrike Building,
Washington 5, D. C.,
Attorney for Petitioners.

APPENDIX



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JOINT APPENDIX

1

Docket No. 33566

WILLIAM S. ABERNETHY and JANE R. ABERNETHY,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Appearances:

For Petitioner: J. Barrett Carter, Esq.

For Respondent: J. Nelson Anderson, Esq.

Docket Entries

1951

Apr. 13—Petition received and filed. Taxpayer notified.
Fee paid.

* * * * *

Jun. 5—Copy of answer served on taxpayer, Washington,
D. C.

1952

* * * * *

Jun. 11—Findings of fact and opinion rendered, Hill,
Judge. Decision will be entered for the respondent. Copy served.

Jun. 11—Decision entered, Hill, Judge, Div. 2.

* * * * *

Sept. 2—Petition for review by U. S. Court of Appeals,
District of Columbia Circuit, filed by taxpayer.

* * * * *

Filed April 13, 1951

Petition

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (SND-IT-mre.) dated February 7, 1951, and as a basis of their proceeding allege as follows:

1. The petitioners are individuals residing at No. 101 Earlston Drive, Washington 16, D. C. The return for the period here involved was filed with the Collector for the District of Maryland.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on February 7, 1951.

3. The deficiency as determined by the Commissioner is income tax for the calendar year 1949 in the amount of two hundred and two and 14/100 dollars (\$202.14) all of which is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

3 (a) In determining the taxable income of the petitioners for the year 1949, the Commissioner erroneously included a payment of twenty-four hundred dollars (\$2,400.00) made to petitioner, William S. Abernethy, by Calvary Baptist Church and Congregation of Washington, D. C., as a gratuity.

5. The facts upon which petitioners rely as the basis of this proceeding are as follows:

(a) In 1941, petitioner, William S. Abernethy, who was then sixty-nine years of age and had been pastor of Calvary Baptist Church and Congregation of Washington, D. C., for twenty years, retired, as he was no longer physically able to perform the arduous duties of a pastor for so large

a congregation. In 1944, the Church, at a regular meeting, passed the following resolution:

"RESOLVED, that, in accordance with the recommendation of the Board of Trustees of this organization, the treasurer of this organization be, and hereby is, authorized and directed to pay to W. S. Abernethy, D.D., Pastor Emeritus of this Church, for and during his lifetime, the sum of \$100.00 per month, in appreciation of his long and faithful service to Calvary Baptist Church."

On March 12, 1947, the Church increased this gratuity to two hundred dollars (\$200.00) a month, and the amount of this gratuity paid to the said William S. Abernethy in 1949 by the Church is the item of income in dispute.

4 WHEREFORE, petitioners pray that the Court may hear this proceeding and find:

(1) That respondent erroneously included in petitioners' taxable income for 1949 the payment of twenty-four hundred dollars (\$2,400.00) received from Calvary Baptist Church and Congregation of Washington, D. C.

(2) And grant such other relief as may be proper.

J. BARRETT CARTER,
J. Barrett Carter,
1101 Denrike Building,
Washington 5, D. C.,
Counsel for Petitioners.

* * * * *

Exhibit "A"**TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE**

Baltimore 1, Maryland
February 7, 1951

Office of
Internal Revenue Agent in Charge
Baltimore Division
104 W. Baltimore St.
Symbols: SND-IT:mre

Mr. William S. Abernethy and
Mrs. Jane R. Abernethy,
Husband and Wife,
101 Earlston Drive,
Washington 16, D. C.

Dear Mr. and Mrs. Abernethy:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1949 discloses a deficiency of \$202.14, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Sixth Floor, 104 W. Baltimore St., Baltimore 1, Md. for the attention of SND-IT. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the

deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,

By J. C. WILMER
*Internal Revenue Agent in
Charge.*

Enclosures:

Statement

Form of waiver—870

MRE/lml

6

STATEMENT

William S. Abernethy and Jane R. Abernethy
Husband and Wife
101 Earlston Drive
Washington 16, D. C.

Tax Liability for the Taxable Year Ended
December 31, 1949

Income Tax

1949

Deficiency
\$202.14

In making this determination of your income tax liability, careful consideration has been given to letter dated September 21, 1950; to your protest dated October 13, 1950 and to the statements made at the conference held on December 20, 1950.

Taxable Year Ended December 31, 1949.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	\$1,212.12
Unallowable deductions and additional income:	
(a) Income	2,400.00
(b) Medical expense	120.00
Total	\$3,732.12
Nontaxable income and additional deductions:	
(c) Contributions	114.42
Net income adjusted	\$3,617.70

EXPLANATION OF ADJUSTMENTS

(a) Income

Amount of \$2,400.00 paid to you by Calvary Baptist Church during 1949 represents taxable income under Section 22 of the Internal Revenue Code.

(b) Medical expense

(c) Contributions

Increase in adjusted gross income because of item (a) above, reduces medical expense and increases contributions as claimed on the return.

7 William S. Abernethy and
Jane R. Abernethy Year ended December 31, 1949

COMPUTATION OF INCOME TAX

Net income adjusted	\$3,617.70
Less: Exemption (4) X \$600.00	2,400.00
Income subject to tentative tax	\$1,217.70

Tentative tax	\$ 243.54
Tax reduction	41.40
Balance of income tax liability	\$ 202.14
Income tax liability disclosed by return, Account No. 8405473	None
Deficiency of income tax	\$ 202.14

* * * * *

8 Filed June 1, 1951

Answer

Comes now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs numbered 1, 2 and 3 of the petition.

4(a) Denies that the Commissioner erred as alleged in subparagraph (a) of paragraph numbered 4 of the petition.

5(a) Denies the allegations contained in subparagraph (a) of paragraph numbered 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that petitioners' appeal be denied.

(Signed) CHARLES OLIPHANT
Charles Oliphant

JNA

Chief Counsel
Bureau of Internal Revenue

* * * * *

Findings of Fact and Opinion

20 T. C. No. 80

THE TAX COURT OF THE UNITED STATES

WILLIAM S. ABERNETHY and JANE R. ABERNETHY,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Docket No. 33566.

Promulgated June 11, 1953.

Where the petitioner, a retired minister, fails to produce evidence sufficient to prove that certain payments received by him from the church and congregation formerly served by him were intended as gifts, *held*, the determination of the respondent that the payments were compensation for past services is sustained.

J. Barrett Carter, Esq., for the petitioners.

J. Nelson Anderson, Esq., for the respondent.

The respondent determined a deficiency of \$202.14 in income tax of the petitioners for the year 1949. The sole issue for our consideration is whether the sum of \$2,400 received by William S. Abernethy in 1949 from Calvary Baptist Church and congregation constitutes taxable income or a gift.

Findings of Fact

The facts were stipulated and are found accordingly.

The petitioners are individuals residing in Washington, D. C. The return for the year here involved was filed with the collector of internal revenue for the district of Maryland.

On May 4, 1941, William S. Abernethy resigned as pastor of Calvary Baptist Church and congregation of Washington, D. C., effective December 31, 1941. He was then 69 years of age, had served as pastor of the church for 20

years, and felt that he was no longer physically able to perform the arduous duties of a pastor for so large a congregation, the church at that time having a membership of over 3,000. Since his retirement he has performed no official duties for the church, and was not expected to do so. However, since his retirement and at the invitation of the present pastor, he has preached at the church once or twice a year as a guest preacher.

On December 18, 1941, the board of trustees of the church reported to a meeting of the membership of the church as follows:

This is a special report covering recent action of the Board of Trustees with respect to a matter which will be of interest to all of Calvary's people. During recent months many individuals have suggested to members of the Board that it would seem appropriate for the church to express its appreciation to our retiring Pastor in some tangible form. This is a subject which has enlisted the serious and prayerful consideration of your trustees. When we contemplate the magnificent service rendered by Dr. and Mrs. Abernethy we realize how impossible it is to give adequate expression to our appreciation. We believe that the sentiment, calling for some gift of appreciation to our Pastor and his wife,

is shared by our people. Acting upon that belief,
 11 your trustees at their regular meeting on Wednesday, December 17, 1941, voted unanimously to suggest to you that the church give Dr. and Mrs. Abernethy, as a token of its gratitude and appreciation, one-half year's salary (\$3650), payable in instalments of \$100 per month, beginning on January 1, 1942. On behalf of the Board of Trustees, I submit this suggestion.

Respectfully,

(s) GOLDEN N. DAGGER.

Golden N. Dagger, who signed the report, was then chairman of the board of trustees of the church.

At the meeting of the members of Calvary Baptist Church and congregation, held December 18, 1941, the following action was taken, as appears from an excerpt from the minutes:

Mr. Dagger submitted recommendation of the Board of Trustees that the Church give Dr. and Mrs. Abernethy, as a token of its gratitude and appreciation, one-half year's salary (\$3650.00), payable in instalments of \$100.00 a month beginning January 1, 1942.

On motion of Mr. Carter, which was seconded by Mr. Cooke and others, the recommendation of the Board of Trustees was unanimously approved.

The church, at a meeting of its members held on March 1, 1944, took the following action, as shown by an excerpt from the minutes:

The Chairman of the Board of Trustees, Mr. Mitchell, presented a report of the activities of the Board during the past quarter, dealing particularly with the splendid condition of the financial affairs of the Church and advising that the Board had approved recommendation that the Church continue to pay the sum of \$100 monthly to Dr. W. S. Abernethy. The report was accepted for filing.

Mr. Carter presented the following resolution and moved its adoption:

12 Resolved, That, in accordance with the recommendation of the Board of Trustees of this Organization, the treasurer of this Organization be, and hereby is, authorized and directed to pay to Reverend W. S. Abernethy, D. D., Pastor Emeritus of this Church, for and during his lifetime, the sum of one hundred dollars (\$100.00) a month, in appreciation of his long and faithful services to Calvary Baptist Church.

The motion was seconded by Mr. Dunkum and the vote was unanimous.

The church continued to pay William S. Abernethy \$100 a month until May 1947, at which time the payments were

increased to \$200 a month pursuant to action taken at a meeting of the members of Calvary Baptist Church and congregation held March 12, 1947, as shown by the following excerpt from the minutes:

Mr. Mitchell moved that the retirement fund of \$200 a month included in the budget for the ensuing year be paid to Dr. Abernethy indefinitely, or until other action is taken by the Church. The motion was seconded and carried unanimously.

In preparing the church budget for submission to the members for approval, the payments to be made to William S. Abernethy were carried under the heading "Retirement".

The petitioners paid income tax on the aforesaid payments received from the church until the taxable year 1949. The petitioners treated such payments received from the church during the taxable year 1949, aggregating \$2,400, as gifts for income tax purposes. The petitioners omitted the total sum of \$2,400 from their taxable income and attached to the return a statement of their position with respect to the amount.

The payments received by petitioner William S. Abernethy from Calvary Baptist Church and congregation were compensation for past services.

13

Opinion

HILL, *Judge*: The only question for our decision is whether the \$2,400 received by petitioner William S. Abernethy in the taxable year 1949 from Calvary Baptist Church and congregation of Washington, D. C. was a gift and therefore excludible from gross income under the provisions of section 22 (b) (3) of the Internal Revenue Code or was within the purview of the terms "salaries, wages, or compensation for personal service" and taxable under section 22 (a) as determined by the respondent.

We must examine the facts and circumstances surrounding the transaction here involved to determine the true in-

tention of the parties with respect to the payments made, for if the payments were in fact intended to be a gift, they would be tax free. However, if they were intended to be compensation for past services, the amounts are taxable as ordinary income to the petitioners. *Bogardus v. Commissioner*, 302 U. S. 34. The evidence before us is meager, consisting of a stipulation of facts. From this the following information may be gleaned. The petitioner, William S. Abernethy, retired from the service of Calvary Baptist Church and congregation at the age of 69 years, after service to that church and congregation for 20 years. At the time of his retirement he was no longer physically able to perform his duties as pastor of a congregation numbering over 3,000. Since his retirement he has performed no official duties for the church and has not been expected to do so, although he has preached once or twice a year to his former congregation as a guest preacher. These facts standing alone reveal almost nothing with respect to the intention with which the payments here involved

14 were made. The intent of the parties must, therefore, be determined, if possible, from the terms of the various resolutions as they appear in the stipulated facts.

On December 18, 1941, the board of trustees of the church suggested to the congregation "that the church give Dr. and Mrs. Abernethy, as a token of its gratitude and appreciation, one-half year's salary (\$3650), payable in instalments of \$100 per month, beginning on January 1, 1942." The minutes of the meeting of the members of Calvary Baptist Church and congregation of the same date contain the following language:

Mr. Dagger submitted recommendation of the Board of Trustees that the Church give Dr. and Mrs. Abernethy, as a token of its gratitude and appreciation, one-half year's salary (\$3650.00), payable in instalments of \$100.00 a month beginning January 1, 1942.

On motion of Mr. Carter, which was seconded by Mr. Cooke and others, the recommendation of the Board of Trustees was unanimously approved.

On March 1, 1944, as evidenced by the minutes of a meeting of the members of the church, it was resolved that the church "pay to Reverend W. S. Abernethy, D. D., Pastor Emeritus of this Church, for and during his lifetime, the sum of one hundred dollars (\$100.00) a month, in appreciation of his long and faithful services to Calvary Baptist Church." Thereafter the church continued to pay William S. Abernethy \$100 a month until May 1947 at which time the payments were increased to \$200 a month, when at a meeting of the members of the church a motion was adopted that the retirement fund of \$200 a month included in the budget for the ensuing year be paid to William S. Abernethy indefinitely, or until other action is taken by the church.

15 The payments with which we are here concerned, totaling \$2,400 in the year 1949, were made under authority of the resolution of March 1, 1944, as amended by the resolution of March 12, 1947, the effect of the amendment being to increase the monthly payment from \$100 to \$200. It is significant that in preparing the church budget for submission to the members of the church for approval at the meeting of March 12, 1947, the payments to be made to William S. Abernethy were carried under the heading "Retirement." We think it inescapable from the facts submitted that the payments by the church to petitioner William S. Abernethy were in consideration of his long and faithful pastoral services. These facts are consistent with the position taken by the respondent.

Certainly the petitioners have failed to overcome the presumption of correctness of respondent's determination herein. Therefore, we are impelled to sustain the respondent and hold the payments here involved to be compensation to William S. Abernethy within the meaning of section

22 (a) of the Code and that accordingly they constitute taxable income.

The petitioners cite the authority of *Schall v. Commissioner*, 174 F. 2d 893, reversing 11 T. C. 111. Suffice it to say that there is a distinguishing difference between the facts of that case and those in the instant case and furthermore we are not convinced that our holding in the *Schall* case was wrong notwithstanding the reversal thereof by the

16 Circuit Court. In any event the evidence before us is not such that we can say that the payments here in question were not intended as a return of value made because of an intention to repay that which was justly due, nor can we say that the payments were bestowed only because of personal affection or regard or pity, or from general motives of philanthropy or charity.

Decision will be entered for the respondent.

* * * * *

17

Decision

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated June 11, 1953, it is

ORDERED AND DECIDED: That there is a deficiency in income tax of \$202.14 for the year 1949.

Entered June 11, 1953.

* * * * *

18 Filed At Hearing, Washington, D. C., Oct. 27, 1952

Stipulation of Facts

It is hereby stipulated and agreed by and between the parties hereto, by their respective undersigned attorneys, that the following facts be taken as true without prejudice to the right of either party to introduce other evidence not inconsistent herewith:

1. On May 4, 1941, William S. Abernethy, one of the petitioners herein, resigned as pastor of Calvary Baptist

Church and Congregation, of Washington, D. C., effective December 31, 1941. He was then sixty-nine years of age, had served as pastor of said church for twenty years, and felt that he was no longer physically able to perform the arduous duties of a pastor for so large a congregation, said church at that time having a membership of over three thousand. Since his retirement he has performed no official duties for said church, and was not expected to do so. However, since his retirement and at the invitation of the present pastor, he has preached at said church once or twice a year as a guest preacher.

19 2. On December 18, 1941, the Board of Trustees of said church reported to a meeting of the membership of said church, as follows:

“This is a special report covering recent action of the Board of Trustees with respect to a matter which will be of interest to all of Calvary’s people. During recent months many individuals have suggested to members of the Board that it would seem appropriate for the church to express its appreciation to our retiring pastor in some tangible form. This is a subject which has enlisted the serious and prayerful consideration of your trustees. When we contemplate the magnificent service rendered by Dr. and Mrs. Abernethy we realize how impossible it is to give adequate expression to our appreciation. We believe that the sentiment, calling for some gift of appreciation to our Pastor and his wife, is shared by our people. Acting upon that belief, your trustees at their regular meeting on Wednesday, December 17, 1941, voted unanimously to suggest to you that the church give Dr. and Mrs. Abernethy, as a token of its gratitude and appreciation, one-half year’s salary (\$3650), payable in installments of \$100 per month, beginning on January 1, 1942. On behalf of the Board of Trustees, I submit this suggestion.

Respectfully,

(s) GOLDEN N. DAGGER.”

Golden N. Dagger, who signed the report, was then Chairman of the Board of Trustees of said church.

3. At the aforesaid meeting of the members of Calvary Baptist Church and Congregation, held December 18, 1941, the following action was taken, as appears from the following excerpt from the minutes of said meeting:

"Mr. Dagger submitted recommendation of the Board of Trustees that the Church give Dr. and Mrs. Abernethy, as a token of its gratitude and appreciation, one-half year's salary (\$3650.00), payable in installments of \$100.00 a month beginning January 1, 1942.

"On motion of Mr. Carter, which was seconded by Mr. Cooke and others, the recommendation of the Board of Trustees was unanimously approved."

20 4. The said church, at a meeting of its members held on March 1, 1944, took the following action, as shown by the following excerpt from the minutes of said meeting:

"The Chairman of the Board of Trustees, Mr. Mitchell, presented a report of the activities of the Board during the past quarter, dealing particularly with the splendid condition of the financial affairs of the Church and advising that the Board had approved recommendation that the Church continue to pay the sum of \$100 monthly to Dr. W. S. Abernethy. The report was accepted for filing.

"Mr. Carter presented the following resolution and moved its adoption:

"Resolved, That, in accordance with the recommendation of the Board of Trustees of this Organization, the treasurer of this Organization be, and hereby is, authorized and directed to pay to Reverend W. S. Abernethy, D. D., Pastor Emeritus of this Church, for and during his lifetime, the sum of one hundred dollars (\$100.00) a month, in apprecia-

tion of his long and faithful services to Calvary Baptist Church.

“The motion was seconded by Mr. Dunkum and the vote was unanimous.”

5. The church continued to pay Dr. Abernethy \$100.00 a month until the month of May, 1947, at which time
21 the payments were increased to \$200.00 a month pursuant to action taken at a meeting of the members of Calvary Baptist Church and Congregation held March 12, 1947, as shown by the following excerpt from the minutes of said meeting:

“Mr. Mitchell moved that the retirement fund of \$200 a month included in the budget for the ensuing year be paid to Dr. Abernethy indefinitely, or until other action is taken by the Church. The motion was seconded and carried unanimously.”

In preparing the church budget for submission to the members for approval, the payments to be made to Dr. Abernethy were carried under the heading “Retirement”.

6. The petitioners paid income tax on the aforesaid payments received from said church until the taxable year 1949. The petitioners treated such payments received from said church during the taxable year 1949, aggregating \$2400.00, as gifts for income tax purposes. In their Federal income tax return for said taxable year 1949, the petitioners omitted said total sum of \$2400.00 from taxable income, attaching to said return a disclosure thereof. A photostatic copy of said return, with attachments, marked “Exhibit 1-A”, is attached hereto and made a part hereof. The respondent determined that said total amount of \$2400.00 paid by said church during the year 1949 represented taxable income as shown in the statutory notice of deficiency

dated February 7, 1951, a true copy of which is attached to the petition filed herein and is made a part hereof.

J. BARRETT CARTER

J. Barrett Carter

Counsel for Petitioner

CHARLES W. DAVIS

Charles W. Davis

Chief Counsel

Bureau of Internal Revenue

Counsel for Respondent

Exhibit 1A

1949

FORM 1040
U. S. Treasury Department
Individual Income Tax Return

U. S. INDIVIDUAL INCOME TAX RETURN

For calendar year 1949 or fiscal year beginning 1949, and ending 1950

EMPLOYEES: Instead of this form, you may use Form 1040A if your total income was less than \$5,000, consisting wholly of wages shown on Forms W-2, or of such wages and not more than \$500 of other wages, dividends, and interest.

Name WILLIAM S. and JANE R. ABERNETHY,
(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both)HOME ADDRESS 101 Earlston Drive,
(PLEASE PRINT. Street and number or rural route)Washington 16, D. C.
(City, town, or post office) (Postal zone number) (State)

Social Security No.

Occupation Clergyman (Retired)

Do not write in these spaces

File

Code

Serial

No.

(Cashier's Stamp)

8405473

1. List your own name.

If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in instructions) with 1949 income of less than \$200 who received more than one-half of their support from you in 1949. If this is a joint return of husband and wife, list dependent relatives of both.

Your
exempt
status

Name (please print)	Check below whether you (or your wife) were at the end of your taxable year—		On lines a and b below— Write 1 if neither 65 nor blind; Write 2 if either 65 or blind; Write 3 if both 65 and blind.
	65 OR OVER	BLIND	
Your name <u>William S. Abernethy</u>	Yes ☒ No ☐	Yes ☐ No ☒	a. Number of exemptions for you <u>2</u>
Wife's (or husband's) name <u>Jane R. Abernethy</u>	Yes ☒ No ☐	Yes ☐ No ☒	b. Number of her (his) exemptions <u>2</u>
Name of Other Dependent Relative			

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) 4Your
income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation (including amounts received in 1949, before PAY-ROLL DEDUCTIONS for taxes, dues, insurance, or retirement expenses, see instructions).

Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
<u>Ministers & Missionaries Benefit Board,</u>	<u>Northern Baptist Convention, N.Y. City,</u>	\$	\$ 785 00
<u>Honoraria (\$1850.00) less traveling expenses</u>	<u>of \$477.90,</u>		1,372 10
Enter totals.		\$	\$ 2,157 10

How to
figure
the tax

3. Enter here the total amount of your dividends.
4. Enter here the total amount of your interest (including interest credited on savings accounts; also interest from Government obligations unless wholly exempt from taxation).
5. If you received any other income, give details on page 2 and enter the total here.
6. Add income shown in items 2, 3, 4, and 5, and enter the total here \$2,696.55

IF YOUR INCOME WAS LESS THAN \$2,000.—You may find your tax in the table on page 4. This table allows about 10 percent of your total income for charitable contributions, interest, taxes, medical expenses, etc. If such deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 2.

IF INCOME WAS \$2,000 OR MORE.—Do not use tax table. Compute tax on page 2. Use standard deduction or itemize deductions, whichever is to your advantage.

HUSBAND AND WIFE.—For split-income benefits, file a joint return. If filing separate returns, use Form 1040, both must sign.

Tax
due or
refund

7. Enter your tax from table on page 4, or from line 18, page 3.	\$	None
8. How much have you paid on your 1949 income tax? (A) By tax withheld (in item 2, above). Attach Original Forms W-2.	\$	340 00
(B) By payments on 1949 Declaration of Estimated Tax		340 00
Enter total here →		340 00
9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here.	\$	
This balance of tax due must be paid in full with return.		
10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here.	\$	340 00
Check (✓) whether you want this overpayment: Refunded to you ☒ or Credited on your 1950 estimated tax ☐		
Do you owe any prior year Federal tax for which you have been billed? <u>NO</u>		
(Yes or No)		

If you filed a return for a prior year, state latest year 1948Where filed Baltimore, Md.To which Collector's office did you pay amount claimed in item 8 (B), above? Baltimore, Md.Country in which you reside Montgomery County, Md.Is your wife (or husband) making a separate return for 1949? No
(Yes or No)

If "Yes," write her (or his) name

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person whose name appears on this return) W. S. Abernethy (Date) 2/6/50(Signature of taxpayer) Jane R. Abernethy (Date)

(Name of firm or employer, if any)

(Signature of taxpayer's wife or husband if this is a joint return) (Date)

To secure any benefits of split-income provisions, husband and wife must include all deductions, and BOTH MUST SIGN, even though only one has income.

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)	\$ 2478 50	4. Total amount received this year	\$ 253 80
2. Amount received tax-free in prior years	1196 40	5. Excess, if any, of line 4 over line 3	
3. Remainder of cost (line 1 less line 2)	1282 10	6. Enter line 3, or 3 percent of line 1, whichever is greater (but do not enter more than line 4)	\$ 74 34

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Real and tangible property	2. Annual dollar or equity	3. Depreciation or depletion (explain in Schedule F)	4. Rents or royalties in Schedule B	5. Other expenses (explain in Schedule B)
Residence	\$ 458 00	50 00	50 00	
Net profit (or loss) (col. 2 less sum of col. 3, 4, and 5)	\$ 458 00	50 00	50 00	358 00

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSIONAL (Partners should attach Form 1065)

State (1) nature of business _____; (2) business name _____
 (3) business address _____

Do NOT include in this schedule cost of goods withdrawn for personal use or distribution not connected with business or profession.

1. Total receipts	\$	11. Salaries and wages not in line 4	\$
COST OF GOODS SOLD (To be used where inventories are on "cost of sales" basis; see instructions on page 2 of Form 1040)		12. Rent	
2. Inventory at beginning of year	\$	13. Interest on business indebtedness	
3. Merchandise bought for sale		14. Taxes on business and business property	
4. Labor		15. Losses (explain in Schedule G)	
5. Material and supplies		16. Bad debts arising from sales or services	
6. Other costs (explain in Schedule G)		17. Depreciation, obsolescence, and depletion (explain in Schedule F)	
7. Total of lines 2 to 6	\$	18. Repairs	
8. Less inventory at end of year		19. Other expenses (explain in Schedule G)	
9. Net cost of goods sold (line 7 less line 8)	\$	20. Net operating loss deduction (attach statement)	
10. Gross profit (line 1 less line 9)	\$	21. Total of lines 11 to 20	\$
		22. Total of lines 9 and 21	\$
		23. Net profit (or loss) (line 1 less line 22)	

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)
 2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

NAME	ADDRESS	AMOUNT
1. Partnership, syndicate, etc.		\$
2. Estate or trust		
3. Other sources (state nature)		

Enter total here →

Total income (or loss) from above sources (Enter on Item 5, page 1) \$ 432 34

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (if building, state whether of white or colored wood)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in year at end of year	5. Depreciation claimed (or allowable) in prior years	6. Remaining cost or other basis to be depreciated	7. Estimated life used in computing depreciation	8. Estimated remaining life beginning of year	9. Depreciation allowable this year
Residence	1941	\$ 7000 00						\$ 50 00

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 4, 15, AND 20 OF SCHEDULE C

1. Nature of loss	2. Explanation	3. Amount	1. Nature of loss	2. Explanation	3. Amount
4.	Breakage and other damage caused by tenants.	50 00			

ITEMIZED DEDUCTIONS—FOR PERSONS NOT USING TAX TABLE ON PAGE 4 OR STANDARD DEDUCTION ON LINE 2 BELOW—
 If husband and wife (not legally separated) file separate returns and one itemizes deductions, the other must also itemize.

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.		Amount
Contributions	<u>SEE SCHEDULE ATTACHED.</u>	
	Allowable Contributions (not in excess of 15 percent of item 6, page 1)	\$ 518 95 404 55
Interest	<u>Interest on life insurance loan.</u>	\$ 10 00
	Total Interest	10 00
Taxes	<u>SEE SCHEDULE ATTACHED.</u>	
	Total Taxes	370 99
Losses from fire, storm, or casualty, or theft		
	Total Allowable Losses (not compensated by insurance or otherwise)	
Medical and dental expenses	<u>SEE SCHEDULE ATTACHED.</u>	
	Net Expenses (not compensated by insurance or otherwise) Enter 5 percent of item 6, page 1, and subtract from Net Expenses.	\$ 834 05 134 84
Miscellaneous (See instructions)		
	Total Miscellaneous Deductions	
TOTAL DEDUCTIONS		\$ 1,484 75

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 6, page 1. This is your Adjusted Gross Income.	\$ 2,096 85
2. Enter DEDUCTIONS. If deductions are itemized above, enter the total of such deductions. If adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of 10 percent of line 1, above, or \$1,000, whichever is the lesser, or \$500 if this is the separate return of a married person.	1,484 75
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income.	\$ 1,212 10
4. Multiply \$600 by total number of exemptions claimed in item 1, page 1. Enter total here.	2,400 00
5. Subtract line 4 from line 3. Enter difference here.	None
Lines 6, 7, and 8 should be filed in ONLY by a single person or a married person making a separate return.	
6. Use the tax rates shown in Instructions to figure your tentative tax on amount shown in line 5 (if line 3, above, includes partially tax-exempt interest, see Instructions). Enter the tentative tax here.	
7. If line 6 is (a) not over \$400, enter 17% of amount on line 6.	
(b) over \$400 but not over \$100,000, enter \$68 plus 12% of the excess over \$400.	
(c) over \$100,000, enter \$12,020 plus 9.75% of the excess over \$100,000.	
8. Subtract line 7 from line 6. Enter the difference here. This is your combined normal tax and surtax.	
Lines 9 to 13 should be filed in ONLY if this is a joint return of husband and wife.	
9. Enter here one-half of amount on line 5, above.	None
10. Use the tax rates shown in Instructions to figure your tentative tax on amount shown in line 9 (if line 3, above, includes partially tax-exempt interest, see Instructions). Enter the tentative tax here.	None
11. If line 10 is (a) not over \$400, enter 17% of amount on line 10.	None
(b) over \$400 but not over \$100,000, enter \$68 plus 12% of the excess over \$400.	None
(c) over \$100,000, enter \$12,020 plus 9.75% of the excess over \$100,000.	None
12. Subtract line 11 from line 10. Enter the difference here.	None
13. Multiply amount on line 12 by 2. Enter this tax here. This is your combined normal tax and surtax.	None
14. If alternative tax computation is made on separate Schedule D, enter here tax from line 12 on back of Schedule D.	
If you use the standard deduction in line 2, disregard lines 11, 12, and 13, and copy on line 16 the same figure you entered on line 8, 11, or 14, whichever is applicable.	
15. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1136).	
16. Enter here any income tax paid at source on tax-free covenant bond interest.	
17. Add the figures on lines 15 and 16 and enter the total here.	
18. Subtract line 17 from line 8, 13, or 14, whichever is applicable. Enter difference here and in item 7, page 1. This is your tax.	None

26 Statement of William S. Abernethy re Non-taxable Income

During 1949 I received from Calvary Baptist Church and Congregation a gratuity of \$2,400.00.

On October 26, 1949, the taxpayers filed claims for refund of the taxes which had been paid on a similar gratuity for the years 1946, 1947, and 1948. These claims have not yet been acted on.

Attached hereto and made a part hereof is a copy of a statement filed with the said claims. The same statement applies to the \$2,400.00 received by me from the Church in 1949, and our contention is that in view of the decision referred to in the attached statement the above amount is not taxable and is not included in our return for 1949.

WILLIAM S. ABERNETHY

27 Statement of William S. Abernethy

In 1941 I resigned as Pastor of Calvary Baptist Church and Congregation, of Washington, D. C., effective December 31, 1941. At that time the Church voted me a gratuity of \$3,600.00, payable in monthly installments of \$100.00 each over a period of three years.

A request was made by the vice-chairman of the Board of Trustees of the Church to the Commissioner of Internal Revenue for a ruling as to whether such gratuity was subject to tax to be withheld by the Church, and on January 11, 1943, the Deputy Commissioner replied (Symbol IT: P:T:2—C:1-GWD) that the payment was subject to tax.

In 1944 the Church, at a regular meeting, passed the following resolution:

“RESOLVED, that, in accordance with the recommendation of the Board of Trustees of this organization, the treasurer of this organization be, and hereby is, authorized and directed to pay to W. S. Abernethy, D. C., Pastor Emeritus of this Church, for and during his lifetime, the sum of \$100.00

per month, in appreciation of his long and faithful services to Calvary Baptist Church.”

On March 12, 1947, the amount to be paid to me by the Church was increased at a Church meeting to \$200.00 a month.

We have included the payments made to me by Calvary Baptist Church and Congregation in our income tax returns as part of our taxable income, because of the ruling of the Deputy Commissioner above referred to. We are now making claim for a refund of so much of the tax paid by us on the amount received by me from Calvary Baptist Church as is not barred by statute of limitations, and base our claim on the decision of the United States Court of Appeals, Fifth Circuit, in *Schall et al. v. Commissioner of Internal Revenue*, 174 Fed. (2nd) 893, decided June 3, 1949. The facts in that case are substantially identical with the facts in my case, and in that case the Court reversed the Tax Court, which had held that the payments were taxable.

When I retired from the pastorate of Calvary Baptist Church and Congregation, I was sixty-nine years of age, and had served the Church for twenty years and felt that I was not longer physically able to perform the arduous duties of a pastor for so large a congregation, and since my retirement I have performed no services for that Church and was not expected to do so, and the action of the Church was purely voluntary and the payments to me were gratuitous.

WM. S. ABERNETHY

30

Filed September 2, 1953

Stipulation of Venue

The Petitioners and the Respondent in the above-entitled case, by their respective attorneys, hereby stipulate, in accordance with the provisions of Section 1141 (b)(2) of the Internal Revenue Code, that the decision of the Tax Court

of the United States in the above-entitled case may be reviewed by the United States Court of Appeals for the District of Columbia.

J. BARRETT CARTER,
J. Barrett Carter,
Attorney for Petitioners.

H. BRIAN HOLLAND,
H. Brian Holland,
*Assistant Attorney General,
Attorney for Respondent.*

July 21, 1953.

31

Filed September 2, 1953

Docket No. 33566

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM S. ABERNETHY and JANE R. ABERNETHY, *Peti-
tioners on Review,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent on
Review*

To the Honorable Judges of the United States Court of
Appeals for the District of Columbia Circuit:

Petition for Review

I.

The petitioners on review hereby petition the United States Court of Appeals for the District of Columbia Circuit to review the decision entered by the Tax Court of the United States on June 11, 1953, that there is a deficiency in income tax of \$202.14 due by the petitioners on review for the year 1949.

II.

JURISDICTION

This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The petitioners on review are citizens of the United States and residents of Montgomery County, Maryland, and filed their joint individual income tax return for the year 1949 with the Collector of Internal Revenue for the District of Maryland. Pursuant to the provisions of Section 1141-(b)(2) of the Internal Revenue Code, it has been agreed and stipulated by the parties herein that the aforesaid decision of the Tax Court of the United States may be reviewed by the United States Court of Appeals for the District of Columbia Circuit.

III.

NATURE OF CONTROVERSY

On May 4, 1941, William S. Abernethy, one of the petitioners herein on review, resigned as pastor of Calvary Baptist Church and Congregation of Washington, D. C., effective December 31, 1941. In 1949 the said Calvary Baptist Church and Congregation made voluntary contributions or gifts to the said William S. Abernethy totalling \$2,400.00, which the petitioners on review treated as a gift and not taxable, relying on the decision of *Schall vs. Commissioner of Internal Revenue*, 174 Fed. (2d) 893. The Commissioner determined that the amount received by the taxpayer constituted taxable income under Section 22-(a) of the Internal Revenue Code, and the Tax Court's decision, dated June 11, 1953, sustained the contention of the Commissioner and held that there was a deficiency of \$202.14 in income tax due by the petitioners on review for the year 1949.

IV.

The petitioners, being aggrieved by the findings of fact and conclusions of law contained in the finding and opinion of the Tax Court and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the District of Columbia Circuit.

J. BARRETT CARTER,
J. Barrett Carter,
1101 Denrike Building,
Washington 5, D. C.,
*Attorney for Petitioners on
Review.*

No. 11,977

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM S. ABERNETHY AND JANE R. ABERNETHY,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,

Assistant Attorney General.

ELLIS N. SLACK,

ROBERT N. ANDERSON,

ROBERT B. ROSS,

Special Assistants to the Attorney General.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

DEC 4 1953

Frederic W. Stewart
CLERK



STATEMENT OF QUESTION PRESENTED

In the opinion of the respondent the question is whether certain retirement payments of \$200 per month, received by the taxpayers (a retired minister and his wife) from his church during the taxable year 1949, were excludible from the taxpayers' gross income as gifts under Section 22(b)(3) of the Internal Revenue Code or were taxable under Section 22(a) of the Code and Section 29.22(a)-2 of Treasury Regulations 111 as compensation for personal services.

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<i>Blair v. Rosseter</i> , 33 F. 2d 286	10
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<i>Hooker v. Hoey</i> , 27 F. Supp. 489, affirmed <i>per curiam</i> , 107 F. 2d 1016	7
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,977

WILLIAM S. ABERNETHY AND JANE R. ABERNETHY,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 8-14) ¹ is reported at 20 T. C. No. 80.

JURISDICTION

This appeal involves income taxes for 1949. It is taken from the decision of the Tax Court entered June 11, 1953. (R. 14.) The petition for review was filed September 2, 1953 (R. 25-27), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code as amended by Section 36 of the Act of June 25, 1948.

¹ The record references herein are to the Appendix to the taxpayers' brief unless otherwise indicated.

STATUTE AND REGULATION INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid * * *.

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(3) [As amended by Section 111(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Gifts, bequests, devises, and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22(a)-1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, * * *, and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) * * *

* * * * *

SEC. 29.22(a)-2.—*Compensation for personal services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States (unless expressly exempt) or by private persons are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one to whom

no services have been rendered are mere gifts or gratuities and are not taxable. * * *

* * * * *

STATEMENT

The facts were stipulated and found by the Tax Court as follows (R. 8):

The taxpayers are individuals residing in Washington, D. C. The return for the year here involved was filed with the Collector of Internal Revenue for the district of Maryland. (R. 8.)

On May 4, 1941, William S. Abernethy resigned as pastor of Calvary Baptist Church and congregation of Washington, D. C., effective December 31, 1941. He was then 69 years of age, had served as pastor of the church for 20 years, and felt that he was no longer physically able to perform the arduous duties of a pastor for so large a congregation, the church at that time having a membership of over 3,000. Since his retirement he has performed no official duties for the church, and was not expected to do so. However, since his retirement and at the invitation of the present pastor, he has preached at the church once or twice a year as a guest preacher. (R. 8-9.)

On December 18, 1941, the board of trustees of the church reported to a meeting of the membership of the church as follows (R. 9):

This is a special report covering recent action of the Board of Trustees with respect to a matter which will be of interest to all of Calvary's people. During recent months many individuals have suggested to members of the Board that it would seem appropriate for the church to express its appreciation to our retiring Pastor in some tangible form. This is a subject which has enlisted the serious and prayerful consideration of your trustees. When we contemplate the magnificent service rendered by Dr. and Mrs. Abernethy we realize how impossible it is to give adequate expression to our appreciation. We believe that the sentiment, calling for some gift of appreciation to our Pastor and his wife, is shared by our people. Acting upon that belief, your trustees at their regular meeting on Wednesday, De-

cember 17, 1941, voted unanimously to suggest to you that the church give Dr. and Mrs. Abernethy, as a token of its gratitude and appreciation, one-half year's salary (\$3650), payable in instalments of \$100 per month, beginning on January 1, 1942. On behalf of the Board of Trustees, I submit this suggestion.

Respectfully,

(S.) GOLDEN N. DAGGER.

Golden N. Dagger, who signed the report, was then chairman of the board of trustees of the church. (R. 9.)

At the meeting of the members of Calvary Baptist Church and congregation, held December 18, 1941, the following action was taken, as appears from an excerpt from the minutes (R. 10):

Mr. Dagger submitted recommendation of the Board of Trustees that the Church give Dr. and Mrs. Abernethy, as a token of its gratitude and appreciation, one-half year's salary (\$3650.00), payable in instalments of \$100.00 a month beginning January 1, 1942.

On motion of Mr. Carter, which was seconded by Mr. Cooke and others, the recommendation of the Board of Trustees was unanimously approved.

The church, at a meeting of its members held on March 1, 1944, took the following action, as shown by an excerpt from the minutes (R. 10):

The Chairman of the Board of Trustees, Mr. Mitchell, presented a report of the activities of the Board during the past quarter, dealing particularly with the splendid condition of the financial affairs of the Church and advising that the Board had approved recommendation that the Church continue to pay the sum of \$100 monthly to Dr. W. S. Abernethy. The report was accepted for filing.

Mr. Carter presented the following resolution and moved its adoption:

Resolved, That, in accordance with the recommendation of the Board of Trustees of this Organization, the treasurer of this Organization be, and hereby is, authorized and directed to pay to Reverend W. S. Abernethy, D. D., Pastor Emeritus of this Church, for and during his lifetime, the sum of one hundred dollars

(\$100.00) a month, in appreciation of his long and faithful services to Calvary Baptist Church.

The motion was seconded by Mr. Dunkum and the vote was unanimous.

The church continued to pay William S. Abernethy \$100 a month until May 1947, at which time the payments were increased to \$200 a month pursuant to action taken at a meeting of the members of Calvary Baptist Church and congregation held March 12, 1947 (R. 10-11), as shown by the following excerpt from the minutes (R. 11):

Mr. Mitchell moved that the retirement fund of \$200 a month included in the budget for the ensuing year be paid to Dr. Abernethy indefinitely, or until other action is taken by the Church. The motion was seconded and carried unanimously.

In preparing the church budget for submission to the members for approval, the payments to be made to William S. Abernethy were carried under the heading "Retirement." (R. 11.)

The taxpayers paid income tax on the payments received from the church until the taxable year 1949. The taxpayers treated such payments received from the church during the taxable year 1949, aggregating \$2,400, as gifts for income tax purposes. The taxpayers omitted the total sum of \$2,400 from their taxable income and attached to the return a statement of their position with respect to the amount. (R. 11.)

The Tax Court further found that the payments received by taxpayer William S. Abernethy from Calvary Baptist Church and congregation were compensation for past services. (R. 11.) The Tax Court entered its decision (R. 14) for the Commissioner and this appeal resulted (R. 25-27).

SUMMARY OF ARGUMENT

Section 22(a) of the Internal Revenue Code provides that gross income includes compensation for personal services of whatever kind and in whatever form paid. Section 29.22(a)-2 of Treasury Regulations 111 specifically provides that

pensions or retiring allowances are income to the recipients. Whether payments such as those here involved constitute compensation for services or gifts depends upon the intention of the parties, particularly the intention of the payor, as disclosed by the facts and circumstances of each case. That the subject payments were motivated by the services previously rendered by the taxpayer (so determined by the Tax Court) can be seen from the use on various occasions, by the board of trustees or the congregation, of the words: "token of its gratitude and appreciation", "the magnificent service rendered," and "in appreciation of his long and faithful services." Also, the church budget carried the sums under the heading "Retirement" and the first amounts paid were couched in terms of the taxpayer's annual salary. Furthermore, for seven years, the taxpayer considered the \$200 monthly payments to be taxable pension payments, motivated by his past services to his congregation. The Tax Court properly found that the taxpayer had failed to overcome the presumption of correctness of the Commissioner's determination that the sums were compensation for past services rendered.

ARGUMENT

The Tax Court Correctly Determined That Certain Payments Received by the Taxpayer in 1949 Were Taxable as Compensation for Personal Services

The issue in this case is simply whether certain amounts received by Reverend William S. Abernethy after his retirement constituted gifts under Section 22(b) (3) of the Internal Revenue Code, *supra*, or compensation for services under Section 22(a) of the Internal Revenue Code, *supra*. It is our position that the Tax Court correctly held that the payments here involved were taxable compensation within the meaning of Section 22(a) of the Code.

Section 22(a) provides that gross income includes compensation for personal services of whatever kind and in whatever form paid. The Supreme Court has construed this section of the statute as being broad enough to include any income or financial benefit, whatever the form or mode

by which it is effected. *Commissioner v. Smith*, 324 U. S. 177, 181, rehearing denied, 324 U. S. 695; *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716, 729.

Section 29.22(a)-2 of Treasury Regulations 111, *supra*, provides in part that pensions or retiring allowances are income to the recipients. A similar provision has been in the Regulations for over 30 years.² Since Section 22(a) has been reenacted without material change during the period in which the Regulations have been in existence, the Regulations now have the force and effect of law. *Coast Carton Co. v. Commissioner*, 149 F. 2d 739, 741 (C. A. 9th); *Hooker v. Hoey*, 27 F. Supp. 489, 490 (S. D. N. Y.), affirmed *per curiam*, 107 F. 2d 1016 (C. A. 2d). Furthermore, the rulings of the Internal Revenue Service have long stated that pensions should be treated as compensation for past services, with the entire amount received being taxable to the recipient. G. C. M. 14593, XIV-1 Cum. Bull. 50 (1935). Even though the pension might be granted after the services have been rendered, the payments received are considered additional compensation for past services.³ L. O. 1040, 3 Cum. Bull. 120 (1920). Even though clergymen might be more deserving of tax relief than most taxpayers, their pensions have traditionally been taxable in the same fashion as any one else's. I. T. 1157, I-1 Cum. Bull. 69 (1922).

² Article 32 of Treasury Regulations 45 (1920 ed.), promulgated under the Revenue Act of 1918, of Treasury Regulations 62 (1922 ed.), promulgated under the Revenue Act of 1921, of Treasury Regulations 65, promulgated under the Revenue Act of 1924, and of Treasury Regulations 69, promulgated under the Revenue Act of 1926; Article 52 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, and of Treasury Regulations 77, promulgated under the Revenue Act of 1932; Article 22 (a)-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938; and Section 19.22 (a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code.

³ Payments to widows and estates are also taxable where services (on which the payments are based) have been rendered to the payor. *Varnedoe v. Allen*, 158 F. 2d 467, 468 (C.A. 5th), certiorari denied, 330 U.S. 821; *Bausch's Estate v. Commissioner*, 186 F. 2d 313 (C.A. 2d); I.T. 4027, 1950-2 Cum. Bull. 9.

The Internal Revenue Code recognizes past consideration as a valid exchange for present compensation. It does not matter that payments for services are entirely voluntary and legally unenforceable. Nor does it matter that a former employer has nothing but a clearer conscience to gain from the payment of adequate compensation for past services. It suffices that those services motivated the payments. *Old Colony Tr. Co. v. Commissioner*, *supra*, pp. 729-730; *Carragan v. Commissioner*, 197 F. 2d 246, 248 (C. A. 2d); *Levey v. Helvering*, 68 F. 2d 401, 62 App. D. C. 354; *Bass v. Hawley*, 62 F. 2d 721 (C. A. 5th). Moreover, there is a presumption that amounts paid by an employer to an employee are paid as compensation for services rendered and not out of altruism. *Carragan v. Commissioner*, *supra*, p. 249; *Smith v. Manning*, 189 F. 2d 345, 348 (C. A. 3d); *Poorman v. Commissioner*, 131 F. 2d 946 (C. A. 9th); *Willkie v. Commissioner*, 127 F. 2d 953 (C. A. 6th), certiorari denied, 317 U. S. 659.

Determination of the question here involved, i. e. whether the payments were compensation or gifts, depends upon the intention of the parties as determined from all of the surrounding facts and circumstances (*Bogardus v. Commissioner*, 302 U. S. 34, 43-44; *Commissioner v. Jacobson*, 336 U. S. 28, 50-51; *Smith v. Manning*, *supra*, p. 348; *Grace v. Commissioner*, decided June 27, 1947 (1947 P-H T. C. Memorandum Decisions, par. 47,173) affirmed *per curiam*, 166 F. 2d 1022 (C. A. 2)), and the intention of the payor is particularly important (*Willkie v. Commissioner*, *supra*). The Tax Court found that the payments received by the taxpayer from the Calvary Baptist Church were compensation for services, being "in consideration of his long and faithful pastoral services." (R. 11, 13) Hence, they could not be gifts. This finding of the Tax Court if supported by substantial evidence will not be disturbed. (*United States v. Gypsum Co.*, 333 U. S. 364, 394-395; Section 1141(a), Internal Revenue Code.

That the congregation intended the payment of compensation for past services can readily be seen from the use, both by the board of trustees and the congregation, of the

words "token of its gratitude and appreciation" (R. 9, 10, 12.) i. e., gratitude and appreciation for past services. The board of trustees spoke of "the magnificent *service* rendered" (italics supplied) (R. 15) and on the minutes of the meeting of the members of the church for March 1, 1944, can be found the phrase "in appreciation of his long and faithful *services*" (italics supplied) (R. 10, 13, 16-17). Words such as "in recognition of the very efficient manner" in which a company's affairs had been handled by a particular taxpayer and "in appreciation of services rendered" have been held by the courts to be evidence in support of holdings that payments were taxable as additional compensation for past services rendered. *Nickelsburg v. Commissioner*, 154 F. 2d 70 (C. A. 2d); *Willkie v. Commissioner*, *supra*. Furthermore, here the congregation carried the payments under the heading "Retirement" on the church budget and at the May, 1947, meeting the payments were referred to as "the retirement fund." (R. 11, 13, 17.) Initially, the first payments paid at the time of retirement were measured in terms of the annual salary previously received by the taxpayer (i.e. "one-half year's salary"). (R. 10, 12, 16.) Use of a taxpayer's annual salary as a measuring rod has been held to be evidence of an employer's intent to pay compensation for past services. *Bausch's Estate v. Commissioner*, 186 F. 2d 313 (C. A. 2d); *Poorman v. Commissioner*, *supra*, p. 949; *Willkie v. Commissioner*, *supra*.

It is significant that on his income tax returns for the years prior to the instant taxable year 1949, the taxpayer treated payments such as those in question as taxable income and paid tax thereon. Logically, if the payments had not been intended as a pension or retirement allowance for past services rendered, the point would have been seriously raised in 1942, the year first following the taxpayer's retirement. *Smith v. Manning*, *supra*, p. 348. Also, there has been no showing that it was not the established custom of the Calvary Baptist Church or its superior governing body to provide pensions or retirement allowances to all its aged ministers. If there was such a custom, certainly

Reverend Abernethy was cognizant of it and was relying upon it, so that such payments would definitely be part of his employment contract. Indubitably, a retirement allowance received under such circumstances could not be labeled a "gift."

This case is clearly distinguishable on the facts from *Bogardus v. Commissioner, supra*, and *Schall v. Commissioner*, 174 F. 2d 893 (C. A. 5th), upon which taxpayer relies.⁴ In the *Bogardus* case the persons to whom the payments were made never were employees of the payor. In the *Schall* case, the Court of Appeals thought that in the circumstances the payments were not intended as compensation for services or a return of value, but bestowed only because of personal affection or regard or pity, or from general motives of philanthropy or charity.⁵ Moreover, it is at least doubtful whether the Court of Appeals should have reversed the Tax Court in the *Schall* case which had held that the payments were taxable. *Schall v. Commissioner*, 11 T. C. 111.⁶

⁴ Taxpayer also mentions *Blair v. Rosseter*, 33 F. 2d 286, which was decided by the Ninth Circuit on June 17, 1929, holding that a single \$50,000 payment by a corporation to its former president was a gift, apparently on the assumption that a corporation could not pay additional compensation, taxable under the statute, to a former officer for services for which he had already been fully compensated (Pp. 286-287). However, in *Old Colony Tr. Co. v. Commissioner*, 279 U.S. 716, 730, decided June 3, 1929, the Supreme Court said that "payment for services, even though entirely voluntary, was nevertheless compensation within the statute" and cited *Noel v. Parrott*, 15 F. 2d 669 (C.A. 4th), certiorari denied, 273 U.S. 754, with approval. *Blair* was handed down so close upon the heels of *Old Colony* that it is conceivable that the Ninth Circuit did not have the latter decision before it. In any case, *Old Colony* was not cited nor discussed, although an attempt was made to distinguish *Noel v. Parrott*.

⁵ Note that here, since his retirement the taxpayer has preached once or twice a year. Thus it could be argued that the taxpayer is rendering present services in return for his retirement allowance. This was not possible in *Schall*, because the taxpayer had moved permanently from Pennsylvania to Florida for his health.

⁶ Note that the Tax Court is not persuaded by the reasoning of the Fifth Circuit in *Schall*. (R. 14.) Furthermore, the Tax Court continued to disagree with the *Schall* case when it found for the

In *Dewling v. United States*, 101 F. Supp. 892 (C. Cls.), a divided court held that annuities given under the Act of May 29, 1944 c. 214, 58 Stat. 257, to certain employees engaged in the construction of the Panama Canal were not taxable as gratuities. Nevertheless, the majority was aware that retirement allowances, given in recognition of past services, are taxable under the Code, for it said (p. 893):

If the gratuities had been paid in the year the services were rendered, or shortly thereafter, a different question would probably be presented; but thirty years intervened before the Act of May 29, 1944, was passed.

The test as to taxability, as stated in *Nickelsburg v. Commissioner, supra*, p. 71, is whether what was added to the employee's regular compensation was by way of more compensation for a deserving employee or merely to satisfy the employer's desire to become a benefactor. *Thomas v. Commissioner*, 135 F. 2d 378, 379 (C. A. 5th). Here the payments in question were made to Reverend Abernethy following severance of long, steady employment and the Tax Court's determination (R. 11, 13) that they were compensation for long and faithful pastoral services is clearly sound and should not be disturbed. In any event, as the Tax Court pointed out (R. 13), the taxpayer failed to overcome the presumption of correctness of the Commissioner's determination. Finally, the lower court was unable, in view of the evidence, to say (R. 14) that the payments in question were not intended as a return of value made because of an intention to repay that which was justly due, nor could the

Commissioner in *Mutch v. Commissioner*, decided June 23, 1953 (1953 P-H T.C. Memorandum Decisions, par. 53,217), pending on appeal in the Third Circuit. Compare unreported decision of the United States District Court for the Eastern District of Michigan in *Kavanagh v. Hershman*, decided June 29, 1953, now pending on the Government's appeal in the Sixth Circuit, in which it was held that \$5,000 only of an annual \$7,500 pension paid to a retired Rabbi was taxable. Citing *Bogardus* and *Schall*, the court held the remaining \$2,500 to be a gift because it had not been specified prior to taxpayer's retirement. The facts showed the smaller amount to be a sort of cost of living increase because the congregation thought the original \$5,000 inadequate.

court say that the payments were bestowed only because of personal affection or regard or pity, or from general motives of philanthropy or charity.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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NOVEMBER, 1953.

